

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD

In the matter of

United Government Security Officers
of America International and its Local
129,

Respondents,

and

Joseph Anthony Farrell, an
Individual,

Charging Party,

and

David Wehrer, an Individual,

Charging Party

Case No. 04-CB-192246
04-CB-208578
04-CB-207347

**REPLY TO COUNSEL FOR THE GENERAL COUNSEL’S ANSWERING BRIEF
TO EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW
JUDGE ON BEHALF OF THE UNITED GOVERNMENT SECURITY OFFICERS
OF AMERICA AND ITS LOCAL 129**

United Government Security Officers of America International Union (“International”) and United Government Security Officers of America, Local 129 (“Local”) (collectively, “Respondents”) file this reply to the Counsel for the General Counsel’s answering brief to Respondents’ exceptions to the Administrative Law Judge’s (“ALJ”) finding that Respondents violated Section 8(b)(1)(A) of the Act by failing to file a grievance concerning the reinstatement of Joseph Farrell’s past seniority. In several instances, Counsel for the General Counsel has suggested that Respondents ignored certain evidence

contradicting their position. As set out below, Counsel for the General Counsel's reliance upon that allegedly contradictory evidence is misplaced.

1. A Contract Between The Marshal Services And The Employer Did Not Preclude Farrell's Termination.

In the answering brief, Counsel for the General Counsel contends that Joseph Farrell was not terminated because a contract between the Employer and the Marshal Service (General Counsel Exhibit 7) somehow explicitly excludes from termination a CSO who was removed from the contract for failing a medical examination. No language whatsoever contained in General Counsel Exhibit 7 exempts a CSO from termination for failure to pass a medical examination and the contract offers no support for Counsel for the General Counsel's position. General Counsel Exhibit 7 constitutes an excerpt of a contract between the Marshal Service and the Employer. Section H-3 of that excerpt pertains to "Removal of CSOs and Other Contractor Personnel For Violations of the CSO Performance Standard." Counsel for the General Counsel has argued that Section H-3(h) of the contract excludes from termination CSOs who were removed for a failure to meet medical and or physical qualification standards. Section H-3(h), however, simply states that the particular procedures set out in Section H-3(h) of the contract between the Employer and Marshal Service do not apply under such circumstances:

The procedures of Section H-3 do not apply where a COS is removed for failure to meet the contract's medical and/or physical qualification standards and/or firearms qualifications.

As such, the contract excerpt does not address the removal and/or termination of a CSO for failure to meet medical or physical qualification standards and does not, in any way, serve to limit either the Marshal Service's or Employer's ability to terminate or remove a CSO due to the CSO's failure to maintain a qualification.

Further, the contract between the Marshal Service and the Employer addresses certain standards that the Employer must observe when supplying employees to work under the contract with the Marshal Service. The contract does not restrict the Employer from independently terminating and/or removing CSOs from employment with the Employer or employment within the bargaining unit based upon grounds outside the scope of the Marshal's contract with the Employer. As such, Counsel for the General Counsel's reliance upon General Counsel Exhibit 7 is misplaced. As set out in Respondents' brief in support of its exceptions, the record evidence as a whole strongly demonstrates that Farrell was removed from his position as a CSO and from the bargaining unit and was required to re-apply to a new, vacant position.

2. Respondents Did Not Ignore Relevant Inconsistent Testimony In Challenging The ALJ's Credibility Determinations With Regarding Jeffrey Miller.

In the answering brief, Counsel for the General Counsel contends that Respondents ignored certain testimony by Jeffrey Miller on cross-examination in challenging the ALJ's credibility determination regarding Miller. Counsel for General Counsel contends that during cross-examination Miller testified that

he believed Farrell lost his union seniority because he was permanently transferred out of the bargaining unit and because he was discharged for just cause. (Tr, Miller, 203: 24-25; 204: 1-6).

During direct examination, Miller testified that Farrell fell under Article 2, Section 2.2(E) of the collective bargaining agreement losing his past seniority when he was permanently transferred out of the bargaining unit. (Tr, Miller 190: 1-25). During a discussion occurring during Miller's direct testimony, Counsel for Respondents explained that it was Respondents' legal position that Farrell was either terminated by the Employer under Article 2, Section 2.2(B) or permanently transferred out of the bargaining unit by the Employer under Article 2, Section 2.2(E). (Tr, 174: 1-25; 175: 1-25).

The allegedly contradictory testimony cited by Counsel for the General Counsel occurred when Counsel for the General Counsel misstated Miller's earlier testimony during cross-examination and then simply asked Miller to affirm that misstatement:

Q. The documents that we just looked – went through. You stated that he was permanent – in your testimony, you stated that he was permanently transferred out of the bargaining unit and/or he was discharged for just cause. Those are the two subsections under which he was terminated, that you testified that he lost his seniority under those two, correct?

A. Correct

(Tr, Miller, 203: 24-25; 204: 1-6). Where Counsel for the General Counsel introduced the alleged inconsistency in the form of the question, such testimony should be given little weight in assessing Miller's credibility. Miller

was told that he had already testified in a certain manner by Counsel for the General Counsel and simply agreed with that assertion.

3. Respondent Adequately Raised Its Timeliness Defense In Its Answer To The Complaint.

Counsel for the General Counsel contends that it lacked adequate notice of the Respondents' timeliness defense in this matter, because it was unaware of the specifics of that defense, despite acknowledging that Respondents included a § 10(b) defense in its Answer to the Complaint. Here, the ALJ did not permit the parties to give opening statements at hearing. If Respondents' timeliness defense were considered waived under such circumstances, it is unclear as to how a Respondent could preserve defenses raised in the Answer where opening statements are not a part of the proceedings.

Further, the cases cited by Counsel for the General Counsel in claiming that the Respondents belatedly raised its timeliness defense, because its Answer contained only a "bare assertion," are utterly inapposite. See Le Fort Enterprises, Inc., 360 N.L.R.B. No. 119, n.1 (2014) (granting summary judgment, in a refusal to bargain case and without a hearing, where no evidence was offered by the respondent to support the defenses asserted in its answer to complaint); George Washington University, 346 N.L.R.B. 155, n.2 (2005) (granting summary judgment, in a refusal to bargain case and without a hearing, where no evidence was offered by the respondent to support the defenses asserted in its answer to complaint).

Counsel for General Counsel contends that the evidence relied upon by Respondents in asserting its timeliness defense constituted nothing more than

evidentiary background information. As described in detail in Respondents' brief in support of its exceptions, that evidence shows that Farrell was fully aware in 2015, prior to his return to work, that Respondents would not take any further action with respect to the restoration of his seniority, despite his repeated requests, and that he would return to work in a new, vacant position. That evidence is far more than background information; it relates directly and precisely to the controlling elements of the limitations issue.

4. Conclusion.

For the reasons set forth above as well as those included in its brief in support of its exceptions, Respondents respectfully request that the Board grant its exceptions and reverse the ALJ's finding that Respondents violated Section 8(b)(1)(A) by violating the duty of fair representation with regard to the failure to act regarding the restoration of Farrell's past seniority.

Respectfully submitted,

On behalf of the United Government
Security Officers of America International
and its Local 129,

By its attorneys,

/s/ Kristen A. Barnes

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CERTIFICATE OF SERVICE

I, Kristen A. Barnes, hereby certify that I have on this day served by PDF email a copy of the foregoing Reply To Counsel For The General Counsel's Answering Brief To Exceptions To The Decision Of The Administrative Law Judge On Behalf Of The United Government Security Officers Of America And Its Local 129 upon Patricia Tisdale, Esq., [Patrice.Tisdale@nrlrb.gov] Field Attorney, NLRB Region 4, 615 Chestnut Street, Philadelphia, PA, 19106; Joseph Farrell [daytonajoe Farrell@gmail.com]; David Wehrer [kdswehrer@verizon.net]; Laura M. Hagan, Esq. [lhagan@parasys.com]; Siri Chand Khalsa, Esq. [sirichandk@akalglobal.com]; and Frank J. Tunis [fjtunis@wrightreihner.com].

Dated: August 23, 2018

/s/ Kristen A. Barnes

Kristen A. Barnes